

*United States Court of Appeals
for the Second Circuit*



AMICUS BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

Docket No. 74-2306

In the Matter of FAS INTERNATIONAL, INC.
Debtor.

UNITED STATES TRUST COMPANY OF NEW YORK,
Successor Indenture Trustee,
Appellant,
v.
FAS INTERNATIONAL, INC., Debtor,
Appellee.

On Appeal from the United States District Court for the
Southern District of New York

BRIEF OF
INTERESTED BANKS AND TRUST COMPANIES
AS AMICI CURIAE

Dated: December 30, 1974

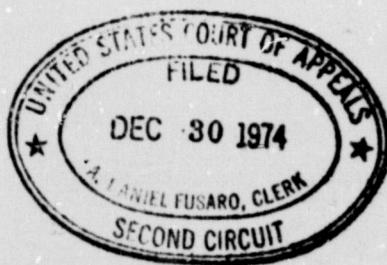
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Bankers Trust Company, Chemical Bank, First
National City Bank, Irving Trust Company, Manufacturers
Hanover Trust Company, Marine Midland Bank - New York
and National Bank of North America, each of whom acts
as trustee under many indentures protecting the holders
of billions of dollars worth of bonds and debentures,

submit this brief, as Amici Curiae, in support of the United States Trust Company's appeal from the order, dated August 26, 1974, of the United States District Court for the Southern District of New York (Gurfein, D.J.) confirming the order, dated September 25, 1973, of the Bankruptcy Court (Roy Babitt, Bankruptcy Judge) denying Appellant and its counsel allowances for services performed by them during the Chapter XI proceeding.

REASON FOR THE FILING OF THIS
AMICUS CURIAE BRIEF

The principal legal question raised by this appeal is whether a Bankruptcy Court in a confirmed Chapter XI arrangement proceeding has the power to award allowances compensating an indenture trustee and its counsel for the valuable services they rendered in the proceeding on behalf of debentureholders who, as a separate class of creditors, were otherwise unrepresented. The Bankruptcy Judge and the District Court answered this question in the negative.

- As we demonstrate, there are important reasons

mandated by the public interest why this question must be answered in the affirmative.

ARGUMENT

In denying the power of a Bankruptcy Court in a Chapter XI proceeding to compensate an indenture trustee and its counsel, the court below has failed to take into account the important and beneficial role, long recognized by Congress, which indenture trustees play in the Bankruptcy Act proceedings as well as the evolution of the Chapter XI proceeding itself.

To Congress the services rendered by indenture trustees were of such importance to the investing public as to warrant the passage of special legislation, the Trust Indenture Act of 1939 (15 U.S.C. §77aaa et seq.), which sets forth standards with respect to the performance of those services. Congress, in effect, acknowledged that the indenture trustee may be the only protection many thousands of small investors have. Without an indenture trustee to represent them, the holders of bonds and debentures are, in many instances, denied

any practical opportunity of protecting their interests in proceedings under the Bankruptcy Act.

Consequently to assure the continued and effective service of indenture trustees, Congress has expressly directed the courts to compensate indenture trustees for the services they render in reorganization proceedings and to reimburse them for their expenses. In a Chapter X reorganization, the judge may "allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate . . . by the indenture trustee . . ." Bankruptcy Act §242, 11 U.S.C. §642 (1938). To receive compensation in such a proceeding, it does not matter whether the plan is accepted or even confirmed by the judge. The paramount objective is that the reasonable efforts of the indenture trustee are recognized and compensated.

Similarly §77 of the Bankruptcy Act, providing for the reorganization of railroads, permits the judge

to "make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceeding and reasonable compensation for services in connection therewith by trustees under indentures" Bankruptcy Act §77(c)(12), 11 U.S.C. §205 (1935).

Clearly Congress realized, when it enacted Chapter X and Section 77, that publicly held debt securities would be involved and would have to be protected. Thus it made certain that indenture trustees in those proceedings would be compensated for their efforts on behalf of the holders of those debt securities.

In contrast to Chapter X and Section 77 reorganizations, the arrangement proceeding provided in Chapter XI (11 U.S.C. §701-799) was not created with the view that it would apply to large companies with complicated financial structures. Since its enactment, however, the Chapter XI arrangement has proved to be a flexible and highly useful tool for the reorganization of relatively small publicly owned companies. As a

result, Chapter XI is now used by companies with debenture issues in the hands of the public. Without the services rendered by their indenture trustee, however, these debentureholders would, for the most part, go unrepresented in a Chapter XI proceeding. The absence of express language authorizing the payment of allowances to indenture trustees in Chapter XI proceedings does not require the conclusion, reached below, that Congress was prohibiting the courts from making such awards. On the contrary the acts of Congress regulating proceedings in which indenture trustees could have been expected to participate suggest precisely the opposite conclusion. There Congress has determined that an indenture trustee shall be awarded reasonable compensation for services rendered, and reimbursement for the reasonable expenses incurred, on behalf of its securityholders.

If sustained, the decision appealed from, could produce very grave consequences for the public holders of securities. Most indentures provide that the trustee is absolved of all liability in refusing

to act where it appears it will not be adequately reimbursed for the expenditure of funds in performing certain tasks.* Consequently, a holding that a Chapter XI court has no power, regardless of the circumstances, to reimburse an indenture trustee for its expenses would appear to relieve the indenture trustee of the responsibility to participate on behalf of debentureholders in a Chapter XI proceeding, thereby leaving debentureholders without effective representation. In that event, the only alternative may be to amend the Chapter XI petition to comply with the requirements of Chapter X and continue the proceeding

*For example, Section 601(c)(4) of the Model Indenture Provisions of the Corporate Debt Financing Project of the American Bar Foundation, provides:

"(4) no provision of this Indenture shall require the Trustee to expend or risk its own funds or otherwise incur any financial liability in the performance of any of its duties hereunder, or in the exercise of any of its rights or powers, if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not reasonably assured to it."

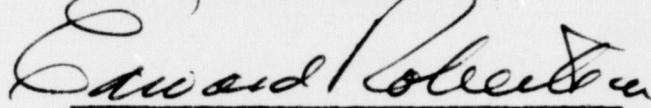
under that provision. See, Bankruptcy Act §328, 11 U.S.C. §728 (1952). It would be unfortunate indeed to discard the useful and flexible tool which Chapter XI has become for the much more cumbersome and uneconomical Chapter X proceeding, especially where a smaller company is involved.

The courts have the congressional mandate to protect the holders of securities by awarding compensation to indenture trustees in all proceedings where it was believed such publicly held securities would be involved. The services performed by indenture trustees in Chapter XI actions are of the same order as those rendered in these other reorganization proceedings. The beneficial role played by indenture trustees should not be foiled by a misreading of congressional intent with respect to Chapter XI. This Court should encourage the salutary evolution of Chapter XI proceedings by holding that a Chapter XI court has the power to grant allowances to an indenture trustee. As is amply pointed out

in the Appellant's brief, there is both statutory and judicial authority for such a holding.

Dated: December 30, 1974

Respectfully submitted,



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